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3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

Case No. 2:15-cr-00285-APG-PAL

8 Plaintiff,

9 v.

**REPORT OF FINDINGS AND
RECOMMENDATION**

10 BENJAMIN GALECKI,

(Mot. Dismiss – ECF No. 207)

11 Defendant.

12 Before the court is Defendant Benjamin Galecki's ("Galecki") Motion Dismiss Due to
13 Prosecutorial Delay (ECF No. 207), which was referred for a Report of Findings of
14 Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4 of the Local Rules of
15 Practice. The court has considered the Motion, co-defendant Ryan Eaton's Motion for Joinder
16 (ECF No. 211), the Government's Response (ECF No. 220), and Galecki's Reply (ECF No. 223).

17 **BACKGROUND**

18 **I. INDICTMENT (ECF No. 1)**

19 Galecki was initially charged in a seven-count Indictment (ECF No. 1) returned October
20 13, 2015, with conspiracy to engage in financial transactions to promote unlawful activity in
21 violation of 18 U.S.C. § 1956(h); conspiracy to transport funds to promote unlawful activity in
22 violation of 18 U.S.C. § 1956(h); conspiracy to commit mail fraud in violation of 18 U.S.C.
23 § 1349; conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349; conspiracy to
24 manufacture, possess with intent to distribute, and distribute a controlled substance analogue
25 intended for human consumption in violation of 21 U.S.C. §§ 802(32)(A), 813, 841(a)(1),
26 841(b)(1)(C) and 846; maintaining a drug involved premises and aiding and abetting in violation
27 of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2; and conspiracy to misbrand drug in violation of 18
28 U.S.C. § 371.

1 The indictment alleges defendants Galecki and Ritchie were partners in Zencense Incense
 2 Works, LLC, a Florida corporation involved in the business of manufacturing and distributing
 3 synthetic cannabinoid products, colloquially referred to as “spice.” Zencense, later named ZIW,
 4 Inc., with the aid of employee R.E., allegedly manufactured up to 200 kilograms of synthetic
 5 cannabinoid product per week in a Las Vegas warehouse at 5435 Desert Point Drive between June
 6 1, 2012 and July 25, 2012 when a federal search warrant was executed there.

7 **II. SUPERSEDING INDICTMENT (ECF No. 56)**

8 A Superseding Indictment (ECF No. 56) was returned August 24, 2016, charging Galecki
 9 with conspiracy to engage in financial transactions to promote unlawful activity in violation of 18
 10 U.S.C. § 1956(h); continuing criminal enterprise in violation of 21 U.S.C. § 848; conspiracy to
 11 transport funds to promote unlawful activity in violation of 18 U.S.C. § 1956(h); conspiracy to
 12 engage in financial transactions to promote unlawful activity in violation of 18 U.S.C. § 1956(h);
 13 conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349; conspiracy to transport funds to
 14 promote unlawful activity in violation of 18 U.S.C. § 1956(h); conspiracy to commit wire fraud
 15 in violation of 18 U.S.C. § 1349; transporting funds to promote unlawful activity and aiding and
 16 abetting in violation of 18 U.S.C. § 1956(a)(2)(A) and 18 U.S.C. § 2; conspiracy to manufacture,
 17 possess with intent to distribute, and distribute a controlled substance analogue intended for human
 18 consumption in violation of 21 U.S.C. §§ 802(32)(A), 813, 841(a)(1), 841(b)(1)(C) and 846;
 19 conspiracy to manufacture, possess with intent to distribute a controlled substance analogue to the
 20 extent intended for human consumption in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and
 21 846; maintaining a drug-involved premises and aiding and abetting in violation of 21 U.S.C.
 22 § 856(a)(1) and 2; conspiracy to misbrand drug in violation of 18 U.S.C. § 371; conspiracy to
 23 launder money instruments in violation of 18 U.S.C. § 1956(h); conspiracy to commit mail fraud
 24 in violation of 18 U.S.C. § 1349; mail fraud and aiding and abetting in violation of 18 U.S.C.
 25 § 1341 and 18 U.S.C. § 2; conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349; wire
 26 fraud and aiding and abetting in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2; conspiracy to
 27 manufacture, possess with intent to distribute, and distribute a controlled substance and a
 28 controlled substance analogue to the extent intended for human consumption in violation of 21

1 U.S.C. § 841(a)(1), 841(b)(1)(C) and 846; possession with intent to distribute a controlled
 2 substance and a controlled substance analog to the extent intended for human consumption and
 3 aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 841(b)(1)(C) and 18 U.S.C. § 2;
 4 conspiracy to manufacture, possess with intent to distribute, and distribute a controlled substance
 5 analogue to the extent intended for human consumption in violation of 21 U.S.C. § 841(a)(1),
 6 841(b)(1)(C) and 846; manufacture a controlled substance analogue to the extent intended for
 7 human consumption and aiding and abetting in violation of 21 U.S.C. § 841(a)(1), 841(1)(C) and
 8 18 U.S.C. § 2; distribution of a controlled substance analogue and aiding and abetting in violation
 9 of 21 U.S.C. § 841(a)(1), 841(b)(1)(C) and 18 U.S.C. § 2; maintain a drug-involved premises and
 10 aiding and abetting in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2; and possession of a
 11 listed chemical with the intent to manufacture a controlled substance analogue intended for human
 12 consumption and aiding and abetting in violation of 21 U.S.C. § 841(c)(1) and 18 U.S.C. § 2.

13 **III. THE PARTIES POSITIONS**

14 **A. Galecki's Motion to Dismiss (ECF No. 207)**

15 The current motion seeks to dismiss the superseding indictment on the grounds that the
 16 pre-indictment delay in this case amounts to a due process violation. The motion relates the
 17 procedural history of the investigation of defendants' conduct in Las Vegas beginning in July 2012
 18 leading up to the application for, and execution of, a search warrant on a Las Vegas warehouse at
 19 5435 Desert Point Drive on July 25, 2012. The motion asserts that on the same day of the search,
 20 co-defendant Ritchie called Escambia County Deputy Sheriff Doyle Gresham requesting to speak
 21 with the DEA. Gresham called DEA Special Agent Claude Cosey ("SA Cosey") who later called
 22 Mr. Ritchie. The two agreed that Cosey would come out to the Zencense production facility in
 23 Pensacola, Florida the following day. On July 26, 2012, Ritchie gave Cosey a tour of the facility
 24 and samples of the product and asked Cosey if he believed there was any violation of federal drug
 25 law. SA Cosey was deposed in a related consolidated civil forfeiture action on May 20, 2015 in
 26 Pensacola, Florida. Excerpts of his deposition transcript are attached as Exhibit 3 to the motion.
 27 SA Cosey testified that Ritchie stated that if Cosey told Ritchie he was doing something illegal
 28 Ritchie would stop immediately. However, Cosey did not tell Ritchie that.

1 The motion relates that over the next seven weeks Ritchie called Cosey on other occasions.
2 On September 13, 2012, Cosey and law enforcement officers from the sheriff's office, the
3 environmental enforcement unit, and the fire marshals came to inspect the manufacturing facility.
4 Mr. Galecki and Ritchie were present, and towards the end of the visit, Ritchie asked to speak with
5 SA Cosey and Sergeant Workman of the Escambia County Sheriff's Office. Quoting excerpts
6 from the deposition transcript, the motion states Ritchie asked the officers whether he was violating
7 the law and Cosey responded "if what you are producing and distributing is not a controlled
8 substance, I cannot . . . interfere with your ability to conduct commerce." SA Cosey also testified
9 he told Ritchie that on September 13, 2012, that "while what you are doing may be legal now, it
10 could change in the future."

11 The motion asserts that later that afternoon, Ritchie called Cosey again and told him the
12 defendants did not want to be under suspicion and had decided to get out of the business. The
13 business was sold within two months, and during that two-month period, neither SA Cosey nor
14 anyone else told the defendants that the substances they were selling were structurally substantially
15 similar to a controlled substance, specifically JWH-018.

16 Although the Northern District of Florida declined to prosecute the defendants, several
17 civil forfeiture actions and criminal prosecutions were brought elsewhere. On January 18, 2013,
18 the government filed its first civil forfeiture action in this district. *United States v. \$177,844.68 in*
19 *U.S. Currency*, Case No. 2:13-cv-00100-JCM-GWF. A second civil forfeiture action was filed in
20 this district on May 29, 2013, Case No. 2:13-cv-00947-JCM-GWF, seeking forfeiture of over
21 \$1,000,000 and several vehicles. The cases were ultimately consolidated on August 18, 2014. The
22 complaint in the second civil forfeiture action was amended to include additional assets and
23 property. A third civil forfeiture action was filed in this district on February 27, 2015, Case No.
24 2:15-cv-00350-APG-CWH, which sought forfeiture of real property located in Las Vegas.

25 Almost three years after the execution of the search warrant in Las Vegas, an indictment
26 was filed in the Northern District of Virginia on April 15, 2015. Galecki was arrested at his home
27 in Pensacola, Florida, on October 5, 2015. Ritchie was away from his home in Utah when law
28 enforcement arrived to arrest him, but flew to Pensacola the next day to turn himself in.

1 The first indictment in this case was filed on October 13, 2015. An indictment was filed
2 in the District of Alabama on October 29, 2015. The government obtained restraining orders in
3 excess of the amount sought in the forfeiture actions effectively freezing Galecki and Ritchie's
4 assets. Defendants are now currently charged in three different federal districts. The motion
5 contends that "it appears that the delay in prosecuting this case was done in order for the
6 government to gain a tactical advantage."

7 Mr. Galecki argues the superseding indictment against him should be dismissed because
8 excessive pre-indictment delay has violated his due process rights under the Fifth Amendment.
9 Galecki acknowledges that to establish a Fifth Amendment violation "a defendant must prove that
10 he suffered actual, non-speculative prejudice from the delay." To meet this burden, the defendant
11 must show exactly how the loss of evidence or witnesses was prejudicial. If the defendant
12 demonstrates actual prejudice, the Ninth Circuit requires the court to weigh the reasons for the
13 delay against the prejudice caused by the delay. To show a due process violation the defendant
14 must show that the prejudicial delay offends fundamental conceptions of justice.

15 Galecki also acknowledges that the Supreme Court has held that statutes of limitations
16 provide the primary protection against oppressive delay in prosecution. Citing *United States v.*
17 *Swacker*, 628 F.2d 1250, 1254 n.5, (9th Cir. 1980), Galecki argues that the Ninth Circuit has
18 indicated that pre-indictment delay that results from negligence or worse may violate due process.
19 In determining whether the defendants' due process rights have been violated, the court applies a
20 balancing test. If the government's conduct is merely negligent, the defendant must show greater
21 prejudice suffered by the delay.

22 The motion cites out-of-district cases holding that although a defendant may bring a pretrial
23 motion to dismiss for pre-indictment delay, the court may not recognize the extent of the prejudice
24 to a defendant until trial. The motion argues that in this case the defendants have been clearly
25 prejudiced by the delay of the prosecution because they have now been charged in multiple
26 jurisdictions and are defending three cases at the same time.

27 Additionally, Galecki maintains the government interfered with the defendants' ability to
28 obtain the testimony of Dr. Berrier, a Senior Research Chemist with DEA's Office of Forensic

1 Sciences. Dr. Berrier concluded that UR-144 is not substantially similar in chemical structure to
2 JWH-018. His testimony would establish that the substance involved in this case is not outlawed
3 by the Analogue Act. The motion claims the government has apparently launched an investigation
4 into Dr. Berrier because in a recent filing in the Fourth Circuit opposing defendants' request to be
5 released on bond, the government represented that Dr. Berrier was "under a cloud of issues related
6 to his employment at the DEA, his conduct on the job, his performance on the job and the way in
7 which his employment with DEA ended." In the consolidated forfeiture action, Magistrate Judge
8 Foley previously granted in part a motion to compel the deposition of Dr. Berrier. However, before
9 Dr. Berrier could be deposed "the government obtained criminal charges." Mr. Galecki claims the
10 "apparent delay in prosecuting this case, has impacted the potential testimony of Dr. Berrier and
11 his ability to appear as a witness on behalf of the defense."

12 Galecki argues that the government has not provided any excuse for not charging the
13 defendants after the search warrant was executed in July 2012. Law enforcement was apparently
14 investigating the defendants in multiple jurisdictions at the same time. The fact that the
15 government also filed forfeiture actions after the search indicates the government was clearly
16 delaying filing criminal charges. The superseding indictment in this case added a continuing
17 criminal enterprise charge, money laundering counts, and mail fraud. These charges are not based
18 on new facts, but appear to be vindictively added because Galecki and Ritchie exercised their
19 constitutional right to a jury trial in the Virginia case.

20 Galecki argues that "it appears the decision to delay prosecution in Nevada was done in
21 order to assert multiple indictments at the same time against the defendants ... to create a tactical
22 advantage by attempting to overwhelm the defendants...." By breaking the charges down into
23 piecemeal litigation "the government apparently hedged itself in the event of an unfavorable jury
24 verdict or ruling." The delayed prosecution has also interfered with the defendants' resources, and
25 their ability to maintain counsel of choice has been hindered. Galecki has been prejudiced because
26 his prior counsel in this action did not timely address certain issues such as joining in defendant
27 Ritchie's motion to dismiss on double jeopardy grounds, or by filing an objection to the order
28 denying defendant's motion to dismiss. The government obtained a tactical advantage by freezing

1 the defendants' funds, restricting witnesses who are now in custody, and by inhibiting the
2 defendants' ability to assert their speedy trial rights in the various jurisdictions. For all of these
3 reasons, the court should dismiss the indictment pursuant to Rule 48(b) of the Federal Rules of
4 Criminal Procedure.

5 Co-defendant Eaton filed a one-line joinder stating he "hereby adopts and incorporates the
6 arguments set forth in Benjamin Galecki's motion as his own."

7 **B. The Government's Opposition (ECF No. 220)**

8 The government opposes the motion arguing that Ritchie and Galecki were first indicted
9 in this district on October 13, 2015, for conduct that occurred in Nevada in 2012. The superseding
10 indictment returned on August 24, 2016, added Eaton as a defendant and charged all three
11 defendants with conduct primarily occurring between March and August of 2012.

12 The motion points out that since the defendants were initially charged in October 2015, the
13 defendants have consented or requested that the court delay the trial on six occasions. The trial
14 date was initially set for March 7, 2016. The first trial was vacated pursuant to a joint complex
15 case motion and rescheduled for October 17, 2016. At the time the government's response was
16 filed trial was set for October 29, 2018. Five days before this motion was filed seeking to dismiss
17 the case for pre-indictment delay, the defendants jointly filed a motion to continue the trial (ECF
18 No. 205).¹

19 The government acknowledges that in the Ninth Circuit, pre-indictment delay within the
20 statute of limitations may in some circumstances require dismissal. However, the defendant has
21 the heavy burden of proving that pre-indictment delay caused actual prejudice. Additionally, the
22 defendant must show the delay was caused by government culpability before the court may find a
23 due process violation. The Ninth Circuit applies a two-prong test in assessing whether excessive
24 pre-indictment delay has resulted in a due process violation. The defendants must first prove that
25 they suffered actual non-speculative prejudice from the delay. If a defendant shows actual
26 prejudice, the court must find that the delay, balanced against the prosecution's reasons for the

27 ¹ On August 7, 2018, the district judge conducted a hearing and granted defendants' joint motion to continue
28 the trial, resetting trial for January 7, 2019, at 9:00 a.m.

1 delay, “offends those fundamental conceptions of justice which lie at the base of our civil and
2 political institutions.” *United States v. Sherlock*, 962 F.2d 1349, 1353–54 (9th Cir. 1989). Both
3 prongs of the test must be established before the court may find the defendants’ due process rights
4 were violated and the Supreme Court has noted that few defendants have been able to establish
5 that they were prejudiced by pre-indictment delay.

6 The court should deny defendants’ motion to dismiss for prosecutorial delay because they
7 make no showing of actual prejudice as a result of the lapse of time between the Las Vegas
8 warehouse search and seizure in late July 2012 and the subsequent indictments. Additionally, “any
9 speculative prejudice is not attributable to the government.” The decisions to file charges in three
10 jurisdictions has already been addressed by the court in other defense motions. The decisions to
11 initiate prosecutions in different districts were made separately by representatives in the districts,
12 and the cases involve separate crimes in separate districts, and cannot support a finding of
13 prejudicial delay.

14 The government disputes that it interfered with the potential testimony of Dr. Arthur
15 Berrier. The government contends that any testimony from Dr. Berrier is irrelevant in this case.
16 He opined in an email that UR-144 is not substantially similar to JWH-018. However, UR-144 is
17 not charged in this case. Although UR-144 and XLR-11 are very similar in structure, the
18 government’s position is that the molecular structure of XLR-11 makes it a distinct substance. The
19 defendants have not demonstrated that Dr. Berrier has opined as to XLR-11. Therefore, his opinion
20 is inadmissible. However, if the court decides his testimony is relevant and admissible, Dr.
21 Berrier’s testimony would be cumulative to the expert testimony of defense experts Drs. Gregory
22 Dudley and Richard Stouch. According to the defendants’ expert notices (ECF Nos. 55, 96), both
23 of these doctors can offer opinion testimony that XLR-11 is not an analogue of JWH-018.

24 Even if the court finds Dr. Berrier’s testimony is relevant and not cumulative, the
25 government is not responsible and could not have “predicted that Dr. Berrier would run afoul of
26 the law.” Dr. Berrier was arrested and charged for soliciting a minor under the age of fifteen for
27 the purpose of sexual contact in June 2017. This charge had nothing to do with his work and was
28 off the premises. Dr. Berrier is still available to testify, and the motion does not claim that his

1 testimony has been affected by the passage of time. Rather, because of his conduct, Dr. Barrier
2 may now be a less credible witness. But this is insufficient to show actual prejudice. The
3 government points out this case was scheduled for trial three times before Dr. Barrier was arrested
4 in 2017. Any damage to Dr. Berrier's credibility is solely attributable to Dr. Berrier and the post-
5 indictment continuances of the trial date, not due to any pre-indictment delay attributable to the
6 government. If the court finds that the defendants suffered actual prejudice, they must demonstrate
7 that the government is responsible for the prejudice, and that the prejudice is not outweighed by
8 the government's reasons for the delay.

9 The government also disputes that any pre-indictment delay was the result of the
10 government coordinating to charge this case in three different jurisdictions, over-burdening the
11 defendants, and draining their resources to create a tactical advantage. The court has already
12 denied Ritchie's Motion to Dismiss (ECF No. 111) based on double jeopardy with the Eastern
13 District of Virginia case. A pending Report of Findings and Recommendation (ECF No. 204)
14 recommends denial of subsequently-filed motions to dismiss based on double jeopardy, the
15 application of the Analogue Act, and failure to state an offense. The prior motions to dismiss have
16 already litigated the government's position that distinct crimes were committed in distinct places.
17 Having to face trial and defending forfeiture actions in the jurisdiction in which the crimes were
18 committed does not amount to undue prejudice. Rather, "it's a result of the defendants' own
19 actions of manufacturing spice intended for human consumption and profiting significantly in that
20 elicited operation."

21 The defendants have failed to meet their burden of establishing the two-prong test
22 promulgated by the Ninth Circuit in *Sherlock*. The defendants' claim of prejudice from the delay
23 between the Las Vegas warehouse seizure and the indictment is purely speculative and not
24 attributed to the government. Finally, the defendants' arguments are severely undercut by their
25 recent motion for a sixth continuance of the trial date.

26 **C. Galecki's Reply (ECF No. 223)**

27 Mr. Galecki replies that the pre-indictment delay in this case has nothing to do with the
28 defendants or their counsel, but "rather was apparently due to the deliberate delay created by the

1 government in an effort to gain a tactical advantage.” Since this case began, Galecki and Ritchie
2 were tried twice in the Eastern District of Virginia. The first trial resulted in a hung jury. The
3 second trial resulted in convictions which were overturned by the Fourth Circuit on appeal and
4 remanded. The government apparently concedes that it arranged for simultaneous prosecutions in
5 three different federal districts in its opposition. The government’s argument that prosecutions in
6 different districts are appropriate because they are distinct crimes in distinct places “highlights that
7 the instant prosecution is just another opportunity for the government to forum shop with the hopes
8 of securing a conviction against the Defendants in at least one jurisdiction.” The reply reiterates
9 that this prosecution strategy “was apparently brought to obtain a tactical advantage, and the
10 government has obtained just that.”

11 In this case the defendants have been substantially prejudiced by the delay in bringing the
12 prosecution because they have now been charged in multiple jurisdictions and are defending three
13 cases at the same time. Judge Foley compelled the deposition of Dr. Berrier in the civil forfeiture
14 case and the apparent delay in prosecuting this case has impacted Dr. Berrier’s potential testimony
15 and ability to appear as a defense witness. The DEA’s own chemist disagreed with the
16 government’s classification of the substances involved in this case. The defendants have been
17 prejudiced because, if they call Dr. Berrier, the government will almost certainly try to impeach
18 and “smear” him at trial because of his recent criminal charge. As a result, Dr. Berrier’s testimony
19 “would potentially not be evaluated on its merits.” The delay has therefore violated defendants’
20 due process rights and the superseding indictment should be dismissed.

21 DISCUSSION

22 The due process clause of the Fifth Amendment of the United States Constitution protects
23 defendants from improper pre-indictment delay. *United States v. Corona-Verbera*, 509 F.3d 1105,
24 1112 (9th Cir. 2007) (quoting *United States v. Sherlock*, 962 F.2d 1349, 1353 (9th Cir. 1989));
25 *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1990). “Generally, any delay between the
26 commission of a crime and an indictment is limited by the statute of limitations.” *Corona-Verbera*,
27 509 F.3d at 1112 (citing *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992)). A statute
28 of limitations provides a predictable, legislatively enacted limit on prosecutorial delay. *United*

1 *States v. Lovasco*, 431 U.S. 783, 789 (1977); *see also United States v. Marion*, 404 U.S. 307, 322
 2 (1971) (the applicable statute of limitations is “the primary guarantee against bringing overly stale
 3 criminal charges”). In some circumstances, however, the Due Process Clause requires dismissal
 4 of an indictment brought within the statute of limitations period. *Corona-Verbera*, 509 F.3d at
 5 1112 (quoting *Huntley*, 976 F.2d at 1290); *Marion*, 404 U.S. at 324–25 (noting that “the Due
 6 Process Clause would require dismissal of the indictment” where the government’s delay caused
 7 actual and substantial prejudice, and the delay was “an intentional device to gain tactical advantage
 8 over the accused”).

9 To succeed on a claim denial of due process because of pre-indictment delay, a defendant
 10 must satisfy both prongs of a two-part test. *Corona-Verbera*, 509 F.3d at 1112. First, the defendant
 11 must prove “actual, non-speculative prejudice from the delay.” *Id.* (citing *United States v. Huntley*,
 12 976 F.2d 1287, 1290 (9th Cir. 1992)). The Ninth Circuit has held that “establishing prejudice is a
 13 ‘heavy burden’ that is rarely met.” *Id.* (citing *Huntley*, 976 F.2d at 1290). If actual, non-
 14 speculative prejudice is shown under the second prong of the test the “length of the delay is
 15 weighed against the reasons for the delay.” *Id.* The defendant must show that the delay “offends
 16 the ‘fundamental conceptions of justice which lie at the base of our civil and political institutions’.”
 17 *Sherlock*, 962 F.2d at 1353–54 (quoting *Lovasco*, 431 U.S. at 790). The second prong of the test
 18 applies only if the defendant has demonstrated actual prejudice. *Corona-Verbera*, 509 F.3d at
 19 1112 (citing *United States v. Barken*, 412 F.3d 1131, 1136 (9th Cir. 2005)).

20 “‘Generalized assertions of the loss of memory, witnesses, or evidence are insufficient to
 21 establish actual prejudice’.” *Id.* (quoting *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir.
 22 1995)). Consequently, a defendant must show both that lost testimony, witnesses, or evidence
 23 “‘meaningfully has impaired his ability to defend himself,” and the “proof must demonstrate by
 24 definite and non-speculative evidence how the loss of a witness or evidence is prejudicial to [his]
 25 case.” *Huntley*, 976 F.2d at 1290; *Corona-Verbera*, 509 F.3d at 1113 (defendant failed to show
 26 actual prejudice where he merely speculated as to what witnesses would have said and offered “no
 27 affidavits nor any non-speculative proof as to how he was prejudiced by the loss of his witnesses”).
 28 In general, “protection from lost testimony ‘falls solely within the ambit of the statute of

1 limitations.” *Corona-Verbera*, 509 F.3d at 1113 (quoting *Sherlock*, 962 F.2d at 1354).

2 The court finds Galecki has failed to meet his heavy burden of establishing that he suffered
3 actual, non-speculative prejudice from the pre-indictment delay. The Ninth Circuit has made it
4 clear the burden to prove actual prejudice is a heavy one, and district courts must apply the actual
5 prejudice test “stringently.” Galecki has not shown any prejudice from the delay between the
6 initial investigation leading up to the execution of the search warrant on July 25, 2012, and the
7 return of the indictment on October 13, 2015. The motion does not claim he lost any evidence,
8 witnesses, or testimony during this timeframe. The motion does not even claim that Br. Berrier is
9 unavailable as a witness, only that he will likely be less credible and subject to impeachment
10 because of his pending criminal charge. The motion does not explain why Dr. Berrier was not
11 deposed in the civil forfeiture action. Judge Foley granted defendants’ request to depose Dr.
12 Berrier in the consolidated civil forfeiture action in an order entered July 10, 2015. *See* Order
13 (ECF No. 119), *United States v. \$177,844.68 in U.S. Currency*, 2:13-cv-00100-JCM-GWF. The
14 defendants deposed DEA Agent Cosey in the consolidated civil forfeiture action on May 20, 2015.
15 *See* Cosey Dep., May 20, 2015, Mot. Ex. 3 (ECF No. 207-3). Yet no explanation at all is provided
16 for why Dr. Berrier was not deposed.

17 Additionally, both Messrs. Galecki and Ritchie have disclosed expert witnesses to provide
18 opinion testimony about whether the substances at issue in this case qualify as analogues. Galecki
19 disclosed Dr. Stouch as an expert witness on December 7, 2016. The disclosure states he is
20 expected to testify based on 30 years of experience in the fields of chemistry and biochemistry,
21 and 30 years of experience in the discovery of new pharmaceuticals “that he does not consider the
22 chemical structures of UR-144 and XLR-11 to be substantially similar to that of JWH-018.” *See*
23 Notice of Expert Witness Testimony (ECF No. 96). Ritchie filed a Notice of Expert Witnesses
24 (ECF No. 55) on August 3, 2016, disclosing as an expert witness Dr. Gregory B. Dudley, Chair of
25 the Department of Chemistry at West Virginia University. Dr. Dudley authored a report titled
26 “Comparative Structural Analysis of JWH-018, UR-144, and XLR-11.” ECF No. 55-2. He
27 concludes that “the similarities and differences between the chemical structures of JWH-018 and
28 UR-144/XLR-11 have been presented and analyzed. In my opinion it is not appropriate to

1 designate these components as structural analogs.” *Id.* Thus, both defendants will be able to offer
2 expert opinion testimony on the same subject matter as Dr. Berrier.

3 Mr. Galecki’s arguments that the government brought three different prosecutions in three
4 different districts and filed civil forfeiture actions to gain tactical advantage is pure speculation.
5 The motion makes this claim using conclusory statements. For example, the motion states “it
6 appears the decision to delay prosecution in Nevada was done in order to assert multiple
7 indictments at the same time against the Defendants ... to create a tactical advantage by attempting
8 to overwhelm the Defendants....” Mot. 16:19–22 (ECF No. 207). He goes on to state that “by
9 breaking the charges down into piecemeal litigation, the government apparently hedged itself in
10 the event of an unfavorable jury verdict or ruling.” *Id.* 16:22–25. This claim is based completely
11 on counsel’s *ipse dixit*.

12 Although the motion makes the conclusory assertion that the government obtained a
13 tactical advantage by freezing the defendants’ assets, Galecki does not claim that he lacks adequate
14 funds to defend himself. He does not identify the witnesses whose testimony is allegedly restricted
15 because they are now in custody. He also does not explain how the defendants were inhibited in
16 their ability to assert their speedy trial rights in various jurisdictions. Defending three criminal
17 prosecutions in three different districts and related forfeiture actions may certainly cause a
18 substantial strain on a defendant’s financial resources. However, Galecki has not established that
19 any conduct by the government has meaningfully impaired his ability to defend himself.

20 Under controlling Ninth Circuit precedent Galecki’s failure to demonstrate actual prejudice
21 ends the court’s inquiry. Because Galecki does not meet his threshold burden of establishing actual
22 non-speculative prejudice, the court need not balance the length of delay against the government’s
23 reasons for delay. Galecki has not established a due process violation under the Fifth Amendment
24 has occurred.

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1 For the reasons explained,

2 **IT IS ORDERED:** Defendant Ryan Eaton's Motion for Joinder (ECF No. 211) is
3 **GRANTED.**

4 **IT IS RECOMMENDED** that Defendant Benjamin Galecki's Motion to Dismiss Due to
5 Prosecutorial Delay (ECF No. 207) be **DENIED.**

6 DATED this 10th day of August, 2018.

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9 PEGGY A. LEEN
UNITED STATES MAGISTRATE JUDGE